

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BANKRUPTCY ESTATE OF CHIEN HWA LEACHMAN, AKA CHIEN HWA WANG,
CHIEN HWA WANG-LEACHMAN by ARTHUR BRUNWASSER, Authorized Agent,

No. C-12-4072 EMC

Plaintiff,

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

(Docket No. 10)

v.

MICHELLE HARRIS, *et al.*,

Defendants.

I. INTRODUCTION

Defendants Michelle Harris and Steven Stoltz, doing business as the Stoltz Family Law Practice, bring this motion to dismiss the legal malpractice complaint filed by Arthur Brunwasser as an “Authorized Agent” on behalf of Plaintiff the Bankruptcy Estate of Chien Hwa Leachman, a.k.a. Chien Hwa Wang or Chien Hwa Wang-Leachman (the “Bankruptcy Estate”). Docket No. 10. Defendants urge the Court to dismiss the complaint because (1) Mr. Brunwasser, as a creditor to the Bankruptcy Estate, may not pursue a claim on its behalf; (2) Defendants are unable to adequately defend themselves, as their defense would require the use of privileged attorney-client communications for which their client, Ms. Leachman, has not waived her privilege; and (3) the statute of limitations bars this action. The Court need not reach Defendants’ attorney-client privilege or statute of limitations arguments, as Mr. Brunwasser is an interested party who may not

1 under applicable law bring this claim on behalf of the Bankruptcy Estate. Thus, the Court **GRANTS**
 2 Defendants' motion to dismiss.

3 **II. FACTUAL AND PROCEDURAL BACKGROUND**

4 This case stems from a divorce and related proceedings stretching back over six years. On
 5 September 12, 2006, Ms. Leachman, represented at the time by Edward Hung, filed a response to a
 6 request for dissolution of marriage in Alameda County Superior Court Case No. RF06275680. *See*
 7 RJN, Docket No. 11, Ex. A.¹ On January 25, 2007 Ms. Leachman filed a substitution of attorney
 8 form substituting Arthur Brunwasser for Mr. Hung. *See* RJN, Docket No. 11, Ex. B. On March 18,
 9 2009, Ms. Leachman substituted Defendants Harris and Stoltz for Mr. Brunwasser as her attorneys
 10 in the Leachman family law marital dissolution case, which representation continues to the present.
 11 Compl., Docket No. 1, ¶ 5; RJN, Docket No. 11, Ex. C. During the course of their representation of
 12 Ms. Leachman, Defendants allegedly provided negligent or deficient legal services constituting
 13 malpractice in several respects, including:

14 A. On or about April 30, 2009, defendants advised Leachman to
 15 voluntarily stipulate to an order adjudicating \$100,000 earned by
 16 Leachman's husband as "recycling fees" as the husband's separate
 17 property, despite the fact that those recycling fees were generated by
 18 the husband's personal services prior to the legal separation of
 19 husband and wife, and therefore constituted community property
 20 under the California Family Code, to Leachman's damage in the sum
 21 of Fifty Thousand (\$50,000) Dollars;

22 B. On or about August 11, 2009, Leachman's husband filed a
 23 motion for "sanctions" under California Family Code § 271, where it
 24 was alleged that the litigation tactics of Leachman and her former
 25 attorney frustrated the policy of the law to promote settlement and to
 26 reduce the cost of litigation by encouraging cooperation between the
 27 parties and their attorneys. Defendants did not conduct research or
 28 investigation to defend that motion and offered no defense, and as a
 result, the motion was essentially unopposed and the superior court

24 ¹ Defendants request judicial notice of fifteen documents filed in Ms. Leachman's family
 25 law case, her fee dispute with Mr. Brunwasser, and her bankruptcy action. *See* RJN, Docket No. 11,
 26 Exs. A-O. In ruling on a 12(b)(6) motion, a court may take judicial notice of undisputed matters of
 27 public record, including documents on file in federal or state courts. *See Harris v. County of*
Orange, 682 F.3d 1126, 1132 (9th Cir. 2012). However, it may not take judicial notice of disputed
 28 facts within public records. *Lee v. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001).
 "[W]hen a court takes judicial notice of another court's opinion, it may do so not for the truth of the
 facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute
 over its authenticity." *Id.* at 690 (internal quotation marks and citation omitted). Thus, the Court
 takes judicial notice of these documents, but not for the truth of any facts recited therein.

1 entered its Statement of Decision on January 25, 2010, imposing
2 monetary sanctions of \$150,000.00 against Leachman, to her damage
in that sum.

3 C. During the course of the family law proceeding, Leachman's
4 husband and his attorney violated California Family Code § 271 by
5 engaging in litigation tactics which unreasonably increased the cost of
 litigation, interfered with settlement and damaged Leachman in the
 sum of at least \$400,000.00, but defendants failed to pursue this claim
 against Leachman's husband.

7 | *Id.* ¶ 6.

8 Mr. Brunwasser obtained a judgment of \$163,502, with interest, against Ms. Leachman on
9 May 31, 2011 for unpaid attorneys' fees. RJN, Docket No. 11, Exs. D, E. Ms. Leachman filed a
10 voluntary petition under Chapter 7 of the Bankruptcy Act on June 2, 2011, which resulted in the
11 Bankruptcy Estate succeeding to all Ms. Leachman's property, including her legal claims. *See id.* ¶
12 1; RJN, Docket No. 11, Ex. F. In the schedules submitted in her bankruptcy claim, Ms. Leachman
13 lists Mr. Brunwasser as an unsecured creditor based on the May 31, 2011 judgment and related
14 costs. RJN, Docket No. 11, Ex. G, Schedule F.

15 On March 15, 2012, the Trustee for Ms. Leachman's Bankruptcy Estate moved to abandon
16 any malpractice claims against Michelle Harris and the Stoltz Family Law Practice. *See* RJD,
17 Docket No. 11, Ex. I. On April 24, 2012, the Bankruptcy Court denied this motion and appointed
18 Arthur Brunwasser as agent of the Bankruptcy Estate for the purpose of prosecuting claims against
19 Harris and the Stoltz Family Law Practice on behalf of, and for the benefit of, the Bankruptcy Estate.
20 *See* Compl. ¶ 1; RJD Ex. J.

21 Plaintiff the Bankruptcy Estate subsequently filed its complaint for legal malpractice in this
22 Court on August 2, 2012 against Defendants Michelle Harris and Steven Stoltz doing business as the
23 Stoltz Family Law Practice. *See* Compl., Docket No. 1.

III. DISCUSSION

25 A. Legal Standard

Under Federal Rules of Civil Procedure, Rule 12(b)(6), a party may move to dismiss based on the failure to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). A motion to dismiss based on Rule 12(b)(6) challenges the legal sufficiency of the claims alleged. *See*

1 *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). In considering such a motion,
 2 a court must take all allegations of material fact as true and construe them in the light most favorable
 3 to the nonmoving party, although “conclusory allegations of law and unwarranted inferences are
 4 insufficient to avoid a Rule 12(b)(6) dismissal.” *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir.
 5 2009). While “a complaint need not contain detailed factual allegations . . . it must plead ‘enough
 6 facts to state a claim to relief that is plausible on its face.’” *Id.* “A claim has facial plausibility when
 7 the plaintiff pleads factual content that allows the court to draw the reasonable inference that the
 8 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also*
 9 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). “The plausibility standard is not akin to
 10 a ‘probability requirement,’ but it asks for more than sheer possibility that a defendant acted
 11 unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

12 B. Standing to Bring Suit on Behalf of Estate

13 Defendants correctly contest that Mr. Brunwasser, as a creditor to the Bankruptcy Estate,
 14 may not assert a legal malpractice claim on behalf of the estate as creditors may not bring suit on
 15 behalf of a bankruptcy estate except for in the limited situation of an avoidance action, which
 16 exception does not apply here; the bankruptcy court does not have authority to grant such standing
 17 to a creditor to prosecute the instant action in contravention of the bankruptcy code.

18 1. Exclusive Statutory Authority to Sue

19 In a bankruptcy proceeding, the bankruptcy trustee has an obligation to collect and reduce to
 20 money the property of the estate, including the debtor’s causes of action. *Smith v. Arthur Andersen*
 21 *LLP*, 421 F.3d 989, 1002 (9th Cir. 2005). “[T]he bankruptcy code endows the bankruptcy trustee
 22 with the exclusive right to sue on behalf of the estate.” *Estate of Spiratos v. One San Bernardino*
 23 *County Super. Ct. Case Numbered SPR 02211*, 443 F.3d 1172, 1176 (9th Cir. 2006). A trustee “may
 24 not be the representative of any particular creditor, but must represent all creditors without
 25 partiality.” *In re AFI Holding, Inc.*, 530 F.3d 832, 844 (9th Cir. 2008) (internal quotation marks and
 26 citation omitted). Thus, a trustee must be “an independent person with no prior connection to either
 27 the debtor or the creditors.” *Id.* at 845 (internal quotation marks and citation omitted).

1 A trustee may, “with the court’s approval, . . . employ one or more attorneys . . . that do not
2 hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or
3 assist the trustee in carrying out the trustee’s duties” 11 U.S.C. § 327(a). A creditor is *not* a
4 “disinterested person” within the meaning of the bankruptcy code. 11 U.S.C. § 101.

5 As a creditor, Mr. Brunwasser is neither “an independent person with no prior connection to
6 either the debtor or the creditors” nor a “disinterested person[],” and therefore clearly could not
7 serve as a trustee or an employee of the Bankruptcy Estate in bringing this litigation. *See In re AFI*
8 *Holding, Inc.*, 530 F.3d at 844-45 ; 11 U.S.C. § 327(a). Plaintiff has not cited any other statutory
9 basis under which Mr. Brunwasser, as a creditor of the Estate and thus not a “disinterested person”
10 under § 101, could act on behalf of the bankruptcy estate.

11 Plaintiff cites *In re Milford Group, Inc.*, 164 B.R. 899 (Bankr. M.D. Penn. 1993), in which
12 the court permitted a creditor’s attorney to represent the bankruptcy estate, for the proposition that
13 interested persons *may* represent the bankruptcy estate unless there is an actual conflict of interest.
14 *See* Pl.’s Opp’n, Docket No. 22, at 7. However, *In re Milford Group* simply exemplifies one of the
15 exceptions carved out in 11 U.S.C. § 327, which specifically provides that a “a person is not
16 disqualified for employment under this section solely because of such person’s employment by or
17 representation of a creditor, unless there is objection by another creditor or the United States trustee,
18 in which case the court shall disapprove such employment if there is an actual conflict of interest.”
19 While there is an exception for a creditor’s attorney, there is no similar exception for those who are
20 not “disinterested persons” (such as the creditors themselves) who are expressly prohibited from
21 representing a bankruptcy estate under the plain meaning of 11 U.S.C. § 327.

22 2. Implied or Equitable Reason to Grant Standing

23 Plaintiff here argues that Mr. Brunwasser is acting as the “agent” of the Bankruptcy Estate,
24 not as a trustee or an employee, and thus does not fall within the bankruptcy code’s prohibition
25 against interested parties serving as a trustee or employee of a trustee. However, Plaintiff does not
26 identify any statutory exception to the exclusive authority delegated trustees to bring suit under
27 which Mr. Brunwasser may proceed. As noted above, no statutory provision authorizes an
28 interested party to act as an agent of the Trustee.

1 To be sure, the Ninth Circuit has recognized one exception to a trustee's exclusive right to
 2 sue on behalf of the bankruptcy estate; this exception arises when the Trustee appoints a
 3 representative to prosecute an avoidance action on behalf of the bankruptcy estate. *See In re*
 4 *Parmetex, Inc.*, 199 F.3d 1029, 1031 (9th Cir. 1999) (Chapter 7 avoidance); *see also In re Curry &*

5 *Sorensen, Inc.*, 57 B.R. 824 (B.A.P. 9th Cir. 1986) (Chapter 11 avoidance).² This unique power

6 stems from implied authority granted under Chapter 11 of the old Bankruptcy Act, as was
 7 recognized in *Matter of Monsour Medical Center*, 5 B.R. 715, 717-18 (Bankr. W.D. Pa. 1980). In
 8 recognizing this authority under the legal regime of the current bankruptcy code, the court in *Matter*
 9 *of Monsour* limited its finding allowing creditors to prosecute on behalf of the estate to avoidance
 10 actions:

11 The Court holds that a creditors' committee's implied authority to sue
 12 to avoid a preference or fraudulent transfer continues under the Code.
 13 This form of creditor protection is particularly effective in cases where
 14 the creditors' allegation is limited to one specific abuse of discretion.
 15 In such cases the remedy of the appointment of a trustee, as discussed
 16 below, may be too harsh.

17 5 B.R. at 718. There is no similarly recognized implied authority to appoint a creditor to pursue
 18 other kinds of third-party claims on behalf of the bankruptcy estate in a Chapter 7 context. Thus,
 19 here there is no basis for granting Mr. Brunwasser standing to bring this claim on behalf of the
 20 Bankruptcy Estate.

21 The one case cited by the parties, *Office of Statewide Health Planning and Development v.*
 22 *Musick, Peeler & Garrett*, 76 Cal. App. 4th 830, 834-35 (1999), held that such a representative
 23 could bring a legal malpractice claim on behalf of the estate, but only pursuant to a Chapter 11
 24 reorganization plan and not pursuant to a Chapter 7 bankruptcy proceeding. Plaintiff has not pointed
 25 to any federal authority similarly recognizing the authority of representatives to bring non-avoidance
 26 actions pursuant to a Chapter 11 reorganization plan, much less any authority recognizing such a
 27 right in the Chapter 7 context.

28 ² The parties invoke a number of California cases addressing assignment of legal
 29 malpractice claims. This case, however, does not involve an assignment, in which case the assignee
 30 would directly recoup proceeds of the litigation, but rather involves the delegation to a
 31 representative to sue on behalf of the bankruptcy estate, in which case the bankruptcy estate stands
 32 to recoup the proceeds of the litigation.

1 The case cited by Plaintiff for the proposition that a bankruptcy estate may prosecute its
2 claims through “a duly authorized representative of the estate,” *Sierra Switchboard Co. v.*
3 *Westinghouse Elec. Corp.*, 789 F.2d 705, 709 (9th Cir. 1986), does not contain this quote or even
4 address this issue, but rather is directed towards a trustee’s inability to abandon claims without
5 notice to creditors. Here, the trustee’s abandonment of claims is not at issue, as the bankruptcy court
6 denied the trustee’s motion to abandon the claim against Defendants. *See* RJD, Docket No. 11, Ex.
7 J.

8 The instant case presents a compelling equitable rationale for denying standing to a creditor
9 to prosecute the third party claim at stake here. Defendants argue that liability for malpractice lies,
10 at least in part, with Mr. Brunwasser, not Defendants. *See* Defs.’ Mot. at 6:2-10. The record shows
11 that Mr. Brunwasser represented Ms. Leachman from around January 2007 to around March 2009.
12 RJD Exs. B, C. A January 2010 order in Ms. Leachman’s family law case imposed \$150,000 in
13 sanctions for unreasonable conduct, specifically referring to conduct that took place while Mr.
14 Brunwasser represented Ms. Leachman, such as when, “on November 25, 2008 [Ms. Leachman]
15 filed a motion to once again take a look at support,” which motion was “totally unnecessary and
16 denied.” RJD Ex. O at 11. Plaintiff specifically cites this award of sanctions as a reason for holding
17 Defendants, not Mr. Brunwasser, liable for legal malpractice. *See* Compl., Docket No. 1 ¶ 6B.
18 Thus, the legal malpractice claim may well result in a cross-claim for indemnity against Mr.
19 Brunwasser in his capacity as the former lawyer in the family law case; this would create a direct
20 conflict of interest between him and the Bankruptcy Estate on whose behalf he is prosecuting the
21 malpractice claim.

22 C. Bankruptcy Court’s Authority to Appoint Representative

23 Lacking any authority permitting a creditor to prosecute a third party claim for malpractice
24 on behalf of the Estate, Plaintiff argued at the hearing in this matter that there is authority within the
25 bankruptcy court’s power under 11 U.S.C. §§ 105(a) and 28 U.S.C. § 1334(b) to issue any order
26 necessary to effectuate the objectives of the bankruptcy proceeding, including, as here, the
27 appointment of a creditor to represent the Bankruptcy Estate in litigation. Plaintiff’s argument is
28 directly contradicted by authority addressing this question.

United States District Court
For the Northern District of California

1 11 U.S.C. § 105(a) provides that “[t]he court may issue any order, process, or judgment that
2 is necessary or appropriate to carry out the provisions of this title.” However, courts have repeatedly
3 recognized limitations to a bankruptcy court’s powers under § 105(a). “[W]hatever equitable
4 powers remain in the bankruptcy courts must and can only be exercised within the confines of the
5 Bankruptcy Code.” *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988). For example,
6 in *In re M-H Group, Inc.*, 139 B.R. 836, 840 (Bankr. N.D. Oh. 1991), the court determined that,
7 notwithstanding § 105(a), it could not permit a law firm that was not a disinterested person to
8 represent the debtors, as such representation would be in contravention of 11 U.S.C. § 327. *See also*
9 *In re Siliconix, Inc.*, 135 B.R. 378, 379 (N.D. Cal. 1991) (“[t]he clear language of the statutes
10 involved proscribes employment of creditors”); *In re Weibel, Inc.*, 161 B.R. 479, 483 (Bankr. N.D.
11 Cal. 1993) (“this Court is not free to read 11 U.S.C. § 327(a) liberally”). “[T]he court cannot
12 approve the employment of a person who is not disinterested, even if the person does not have an
13 adverse interest.” *In re Middleton Arms, Ltd. Partnership*, 934 F.2d 723, 725 (6th Cir. 1991).

14 28 U.S.C. § 1334(b) is a jurisdictional statute that does not address the equitable powers of a
15 bankruptcy court. *Celotex Corp. v. Edwards*, 514 U.S. 300, 303, 307-08 (1995), which Plaintiff has
16 urged the Court to follow, deals with a bankruptcy court’s *jurisdiction* pursuant to 28 U.S.C. §
17 1334(b) to issue an order under 11 U.S.C. § 105(a), not the extent of its equitable powers under 11
18 U.S.C. § 105(a) to take action in contravention of specific provisions of the Bankruptcy Code. Even
19 in its analysis of jurisdiction, the Supreme Court recognized “that a bankruptcy court’s ‘related to’
20 jurisdiction cannot be limitless.” *Id.* For example, “[t]he jurisdiction of bankruptcy courts may
21 extend more broadly in [a reorganization under Chapter 11] than in [a liquidation under Chapter 7].”
22 *Id.* at 309.

23 Thus, the Bankruptcy Court did not have the statutory or implied authority to confer standing
24 upon Mr. Brunwasser, an interested creditor, to bring suit on behalf of the Bankruptcy Estate to
25 prosecute a malpractice suit where such authority contravenes express limitations in the Bankruptcy
26 Code and falls outside of any established implied exception.

27 ///

28 ///

1 **IV. CONCLUSION**

2 Accordingly, the Court **GRANTS** Defendants' motion to dismiss the complaint.

3 This order disposes of Docket No. 10.

4

5 IT IS SO ORDERED.

6

7 Dated: February 1, 2013

8


EDWARD M. CHEN
United States District Judge

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28